IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:07-MC-37-FL

MOBILE BILLBOARDS OF AMERICA, INC., CALIFORNIA MOBILE BILLBOARDS, et. al.,	)	
Plaintiffs,	)	ORDER
v.	)	
PAUL, HASTINGS, JANOFSKY and WALKER, L.L.P.,	)	
Defendant.	)	

This matter comes before the court on the motions of non-party Michael Lomas ("Lomas") to quash a subpoena for deposition and production of documents issued by defendant Paul, Hastings, Janofsky and Walker, L.L.P. ("Paul Hastings"), to grant a protective order barring the requested

Mobile Billboards of America, inc., California Mobile Billboards, et. ..., Janofsky and Walker, LLP. Doc. 7

production of documents and deposition, and to stay the requested production and deposition until the court rules on the motions for protective order and to quash (DE # 1), filed August 2, 2007. Defendant responded, and in this posture, the matter is ripe for adjudication.

Lomas is a defendant in a criminal case "related to the topic of the civil case in which the subpoena is issued."[1] (Lomas' Mot. to Quash at 2.) Lomas seeks to quash the non-party subpoena and for a protective order on grounds of (1) the allegedly unreasonable and unduly burdensome nature of the subpoena; and (2) the desire not to "appear for a deposition in any civil case where the factual issues are related in any way to the issues in the pending criminal matter." (Id. at 3.)

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[1] The civil matter in which the subpoena in question was issued is currently pending in the United States District Court for the Northern District of Georgia. (S. Gregory Hays, Receiver for Mobile Billboards of America, Inc., California Mobile Billboards, et. al. v. Paul, Hastings, Janofsky and Walker, L.L.P., Case No. 1:06-CV-754-CAP.)

First, Lomas argues that due to a variety of factors, including his recent transfer from incarceration to a halfway house, his indigent status, and his inability to access documents, that the subpoena is unreasonable and unduly burdensome. Defendant Paul Hastings advances a legitimate interest in obtaining the discovery sought, as Lomas was the founder and principal of the business which sought legal advice from Paul Hastings, who is the defendant in the civil case in which the subpoena in question was issued. In addition to the advancement of this legitimate interest, Paul Hastings has abandoned the portion of the subpoena seeking production of documents, thereby leaving only Lomas' deposition appearance at issue. Paul Hastings has also scheduled the deposition at a location convenient to Lomas and his attorney, and provided witness fee and mileage reimbursement, the court finds that the subpoena is not unreasonable, nor unduly burdensome. See Amer. Sec. Ins. Co. v. McDonald, 2007 WL 1853857, *1 (W.D.N.C. June 26, 2007) (slip op.) (finding that non-party deponents failed to satisfy their burden of demonstrating subpoena was unduly burdensome where witnesses were within driving distance of the deposition location and where party seeking discovery attempted to alleviate burden and expense of travel).

Second, Lomas suggests that counsel will "recommend that Lomas not give deposition testimony in a civil matter prior to the resolution of his criminal case." (Lomas Mot. to Quash at 3.) Interpreting Lomas' intention not to testify as to factual issues which are related to issues in the pending criminal matter effectively as an assertion of the Fifth Amendment right against self-incrimination, the request must be denied. "It is well-established that a district court may not rule on the validity of a witness' invocation of the fifth amendment privilege against compulsory self-incrimination until the witness has asserted the privilege in response to a particular question."

United States v. Arnott, 704 F.2d 322, 324-25 (6th Cir. 1983). Interpreting Lomas' intention not to testify regarding factual issues related to his criminal case as an objection to the simultaneous advancement of civil and criminal proceedings, Lomas' motion must similarly be denied. Absent special circumstances, there is no bar to parallel civil and criminal investigations proceeding simultaneously. See SEC v. Dresser Indus. Inc., 628 F.2d 1368, 1377 (D.C. Cir. 1980) (identifying special circumstances as those by which substantial rights of a party may be prejudiced). Lomas has failed to demonstrate how the deposition in the civil proceeding will interfere with or otherwise prejudice any substantial right, and the assertion of a desire not to testify as to factual issues related to his own criminal case falls short of his burden to demonstrate the unreasonableness of the discovery sought.

If issues arise during deposition which raise the prospect of frustration of the fair examination of the deponent such that a need to confer with the court or make a motion to terminate or limit the examination pursuant to Fed. R. Civ. P. 30(d) becomes necessary, counsel are directed for the continued efficient administration of justice to make any such application to the court in the Northern District of Georgia, where the case in which the subpoena was issued is pending.

For the foregoing reasons, those parts of Lomas' motion (DE # 1) seeking to quash the subpoena and for a protective order are DENIED. Where the request for production has been abandoned, and court's decision precedes the date set for the deposition, there is no need to stay the matter. Accordingly, that part of Lomas' motion (DE # 1) seeking to stay the requested production and deposition until ruling on the motion to quash and for a protective order is DENIED as moot.

SO ORDERED, this the 9th day of August, 2007.

LOUISE W. FLANAGAN
Chief United States District Judge